

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-014920

08/24/2021

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
M. Corriveau
Deputy

JOHN C D DOE

ROBERT E PASTOR

v.

BIG BROTHERS BIG SISTERS OF AMERICA, JODY CAMPBELL CORBETT
et al.

BIG BROTHERS BIG SISTERS OF
CENTRAL ARIZONA
4745 N 7TH ST STE 210
PHOENIX AZ 85014
JUDGE ASTROWSKY

DENIAL OF DEFENDANT'S MOTION TO DISMISS

The Court considered Defendant's Motion to Dismiss, filed April 12, 2021, Plaintiff's Response, filed June 29, 2021, and Defendant's Reply, filed August 6, 2021. The parties requested oral argument, but the court has concluded that the issue presented has been fully briefed and oral argument will not assist a decision. *See* Maricopa Cty. Loc. R. 3.2(d). Plaintiff attached a plethora of extraneous information to its Response. The Court did not consider same as it did not deem consideration of the Motion to Dismiss needed to be treated in the manner in which the Court would treat a Motion for Summary Judgment. Furthermore, the Court did not deem the supplemental information to be central to the complaint and public records pertaining to matters referenced in the Complaint. *See Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60 (App. 2010).

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Plaintiff's Complaint¹, very generally, alleges Defendant Big Brothers Big Sisters of America ("BBBSA") is responsible for the sexual abuse Plaintiff suffered as a result of the actions of his assigned Big Brother, Italo Arbulu. Plaintiff alleges BBBSA knew that their program attracted child sexual abusers; thus, all BBBSA case workers should be aware of grooming behavior and staff approval should be required before home visits and travel with the Big Brother are approved. In June or July of 1983, BBBSA matched Mr. Arbulu to Plaintiff. Plaintiff alleges that he had overnight visits with Mr. Arbulu in violation of BBBSA's policy. Sadly, in July 1983, when Plaintiff was nine years old, he reported to law enforcement that Mr. Arbulu perpetrated multiple acts of sexual abuse against him. Mr. Arbulu is not a party to this lawsuit. Plaintiff claims that BBBSA is responsible for Mr. Arbulu's actions because, in part: it knew or should have known that their program attracts pedophiles, so the children are at high risk of abuse, especially during home visits or overnight visits; BBBSA knew of or had actual knowledge of Mr. Arbulu's misconduct; BBBSA stood *in loco parentis* to Plaintiff and owed him a duty to protect him from injury; BBBSA put Plaintiff at risk of sexual abuse; BBBSA failed to properly supervise Plaintiff or provide him with a safe environment; BBBSA failed to warn Plaintiff's family that there is a history of abuse in youth-serving organizations; BBBSA knew or should have known Mr. Arbulu was a danger to children; and BBBSA was negligent in failing to properly educate, train, and supervise Mr. Arbulu.

Defendant's Motion to Dismiss is premised upon Rules 8(a), 9(f), and 12(b)(c), Ariz.R.Civ.P. Defendant argues Plaintiff's claims are barred by the statute of limitations, Plaintiff's Complaint fails to state a claim for which relief may be granted, and the application of A.R.S. § 12-514 against them is unconstitutional.

STATUTE OF LIMITATIONS

Generally, the statute of limitations for personal injury actions in Arizona is two years. See A.R.S. §12-542. However, if an incident that gives rise to potential liability occurs against a minor, the statute of limitations does not begin to run until the plaintiff turns eighteen years old. In recognition of the plethora of abuse that minors suffered by the actions of predatory adults the Arizona legislature, in 2019, enacted A.R.S. § 12-514, which extends the statute of limitations applicable to sexual abuse claims to twelve years after the plaintiff reaches the age of eighteen "and not afterward."

In the present action, Plaintiff alleged that in 1983, when he was nine years old, he reported to law enforcement that Mr. Arbulu perpetrated multiple acts of sexual abuse against

¹ Plaintiff filed an Amended Complaint on June 29, 2021, *i.e.*, after BBBSA filed its Motion to Dismiss. When the Court references Plaintiff's Complaint it is referencing the Amended Complaint. The dismissal of the Amended Complaint is what the Court addresses in this ruling.

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him. Therefore, while we don't know Plaintiff's exact date of birth, there can be no dispute that he turned eighteen years old in 1991 or 1992. Accordingly, Defendant argues Plaintiff's claim is time barred. However, the analysis of this issue is not that simple. When the legislature enacted A.R.S. §12-514, it also enacted a special provision providing that an A.R.S. § 12-514(A)(1) cause of action that would otherwise be time barred because of an applicable statute of limitations "is revived and may be commenced before December 31, 2020." Ariz. Sess. Laws ch. 259, § 3 (54th Legis., 1st Reg. Sess. filed May 27, 2019.) Plaintiff filed the Complaint on November 18, 2020, within the December 31, 2020 statutory deadline.

Yet, the analysis concerning the statute of limitations issue is still not complete. While Plaintiff's claim was revived by law, there is a limit to same. The legislature also provided that a cause of action revived under A.R.S. § 12-514(A)(1) "may be brought against a person who was not the perpetrator of the sexual conduct or sexual contact if that person knew or otherwise had actual notice of any misconduct that creates an unreasonable risk of sexual conduct or sexual contact with a minor by an employee, a volunteer, a representative or an agent." Ariz. Sess. Laws ch. 259, § 3(C). Hence, while Plaintiff filed his initial Complaint prior to December 31, 2020, he still must demonstrate that BBBSA knew or otherwise had actual notice that any alleged misconduct created an unreasonable risk of a sexual act with a minor by a Big Brother such as Mr. Arbulu. Plaintiff makes such a claim in his Complaint. Defendant takes the opposite position.

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa*, 230 Ariz. 352, 363, ¶46, 284 P.3d 863, 874 (2012). Instead, the narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient "to warrant allowing the [plaintiff] to attempt to prove [its] case." *Id.* at 363, ¶46, 284 P.3d at 874 (emphasis added). Dismissal is permitted only when a "plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶4, 954 P.2d 580, 582 (1998) (emphasis added). Moreover, a motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true [*Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966))], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, ¶2, 326 P.3d 335, 336 (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶7, 189 P.2d 344, 346 (2008)].

"Arizona follows a notice pleading standard." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012), quoting *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The purpose of a complaint is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen, id.*, quoting *Mackey v. Spangler*, 81 Ariz. 113,

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115 (1956). A complaint that states only legal conclusions, without supporting factual allegations, does not comply with Rule 8's notice pleading standard. *Cullen, id.* If a complaint does not comply with Rule 8, the defendant may move to dismiss for failure to state a claim. *Cullen, id.*; Ariz. R. Civ. P. 12(b)(6).

Here, Plaintiff's Complaint does cite facts sufficient enough to allege that BBBSA "knew or otherwise had actual notice" of Mr. Arbulu's misconduct that created an unreasonable risk of sexual conduct or sexual contact with Plaintiff. Accordingly, Plaintiff's Complaint is not time barred.

CONSTITUTIONALITY OF A.R.S. §12-514

Defendant argues the legislature's attempt to revive sexual abuse claims that were previously time-barred is unconstitutional. "An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) (quoting *State v. Ramos*, 133 Ariz. 4, 6 (1982)). A "party challenging the validity of a statute has the heavy burden of overcoming that presumption." *State v. Tyau*, 250 Ariz. 659, 664 ¶ 13 (App. 2021) (quoting *State v. McMahon*, 201 Ariz. 548, 550 ¶ 5 (App. 2002)).

Defendant argues that the statute is a prohibited ex post facto law. "That the state and federal constitutional prohibition against the enactment of ex post facto laws applies only to statutes dealing with criminal matters has long been settled." *Ray v. Rambdaud*, 103 Ariz. 186, 188 (1968). See also *State v. Trujillo*, 248 Ariz. 473, 487 ¶ 78 (2020) (The "prohibition against ex post facto laws only applies to criminal laws."); *Galvan v. Press*, 347 U.S. 522, 531 & n.4 (1954) (The ex post facto bar only applies to criminal laws, and not to civil ones.). A.R.S. § 12-514 deals with a civil matter. It is not a statute subject to the state or federal prohibitions against ex post facto laws.

Defendant also argues that the application of the statute to a claim based upon an act that was previously time-barred violates their due process rights. However, statutes of limitations are "good only by legislative grace" and are therefore "subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson*, 324 U.S. 304 (1945). And so, "statutes of limitations go to matters of remedy, not to destruction of fundamental rights." *Id.* (citing *Campbell v. Holt*, 115 U.S. 620, 628 (1885) (In civil matters, a change in the statute of limitations does not affect a "vested right.")). A statute that has the "effect of lifting any preexisting bar of the general limitation statute" would not "violate the due process clause of the Fourteenth Amendment." *Chase Securities*, 325 U.S. at 309. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation." *Id.*

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at 315. Accordingly, the legislature's effort to revive claims such as that of Plaintiff in the present action is not unconstitutional.

SUFFICIENCY OF PLAINTIFF'S COMPLAINT

Defendant argues Plaintiff's Complaint fails to state any claim upon which relief may be granted. As a general policy matter, Rule 12(b)(6) motions to dismiss are not favored under Arizona law. *State ex. rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). That is especially true when such motions are based on pleading insufficiencies. *E.g.*, *Cagle v. Carr*, 101 Ariz. 225, 227, 418 P.2d 381, 382 (1966); *see generally Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 533, ¶10, 115 P.3d 124, 127 (App. 2005) (reversing summary judgment for defendant and recognizing sufficiency of complaint despite "numerous technical deficiencies in the document"). The more effective and efficient way to deal with the issue is through the mandatory disclosure process. *See e.g.*, *State ex. rel. Corbin*, 136 Ariz. at 594, 667 P.2d at 1309.

Overall, while the Court understands BBBSA arguments concerning the ultimate viability of Plaintiff's claim based upon what was plead, Plaintiff still sufficiently plead its Complaint as to all claims. Perhaps the discovery process will lead to information that will further substantiate Plaintiff's claims, or perhaps it will lead to a successful Motion for Summary Judgment. Regardless, it is appropriate for this case to move forward with the discovery process.

IT IS ORDERED denying Defendant's Motion to Dismiss, filed April 12, 2021.

IT IS FURTHER ORDERED that, not later than 30 days from the date of entry of this order, the parties shall meet and confer for the purpose of preparing and filing a joint report and proposed scheduling order that complies with Ariz. R. Civ. P. 16(c) and that is substantially in the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. The parties must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases. Unless the parties are otherwise able to reach agreement on all subjects addressed in the proposed scheduling order, "meet and confer" means either face-to-face or telephonic efforts and not merely an exchange of letters, e-mails, faxes, and the like. If, despite that, the parties are unable to reach agreement on all Rule 16(c)(3) subjects, the parties shall submit a proposed joint scheduling order identifying the subjects of disagreement within the proposed order in some easily decipherable manner, but without argument. The Court will schedule a hearing, if necessary, to resolve any disputes.